

No. 15188.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LEO MANTIN,

Appellant,

vs.

BROADCAST MUSIC, INC., a corporation, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

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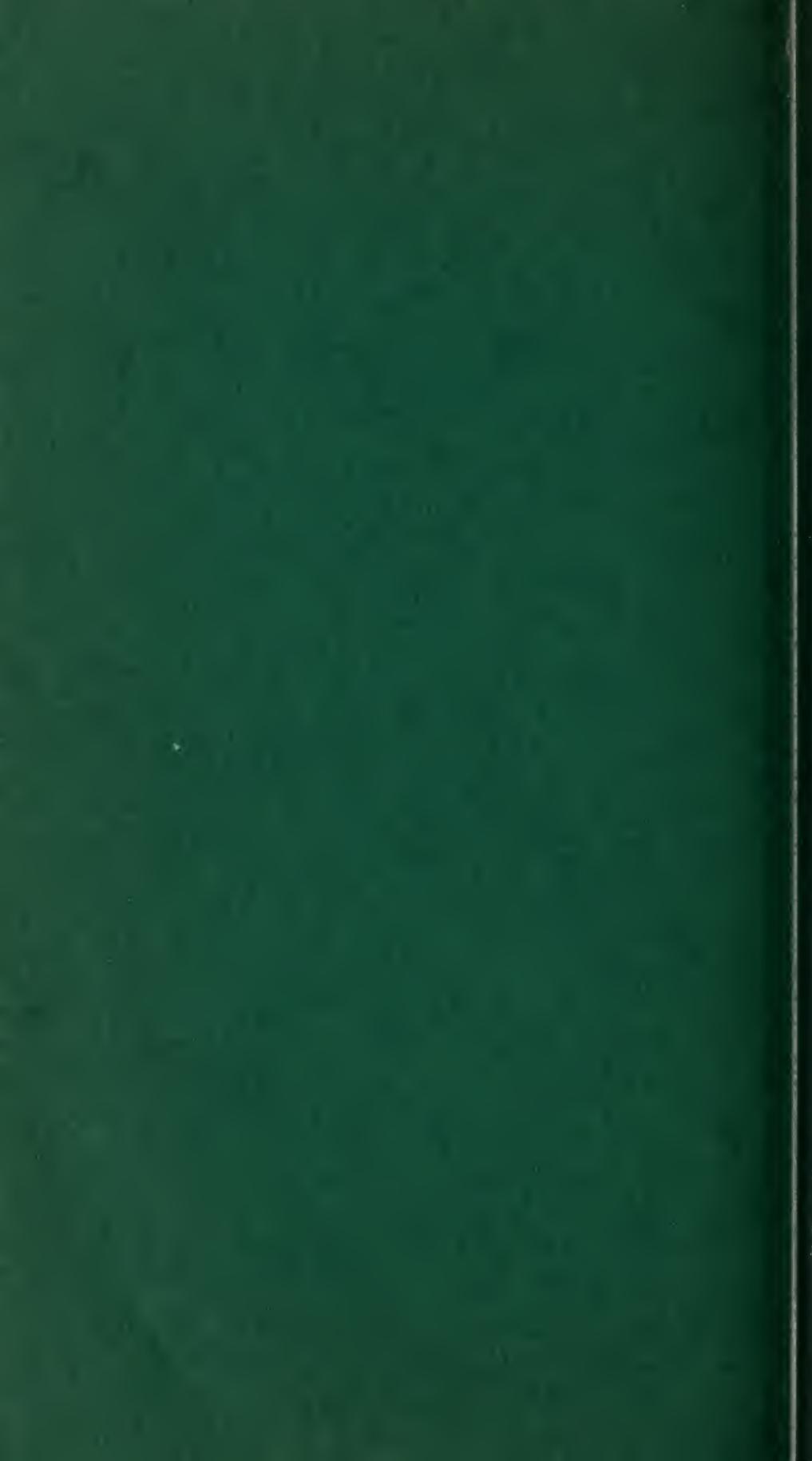
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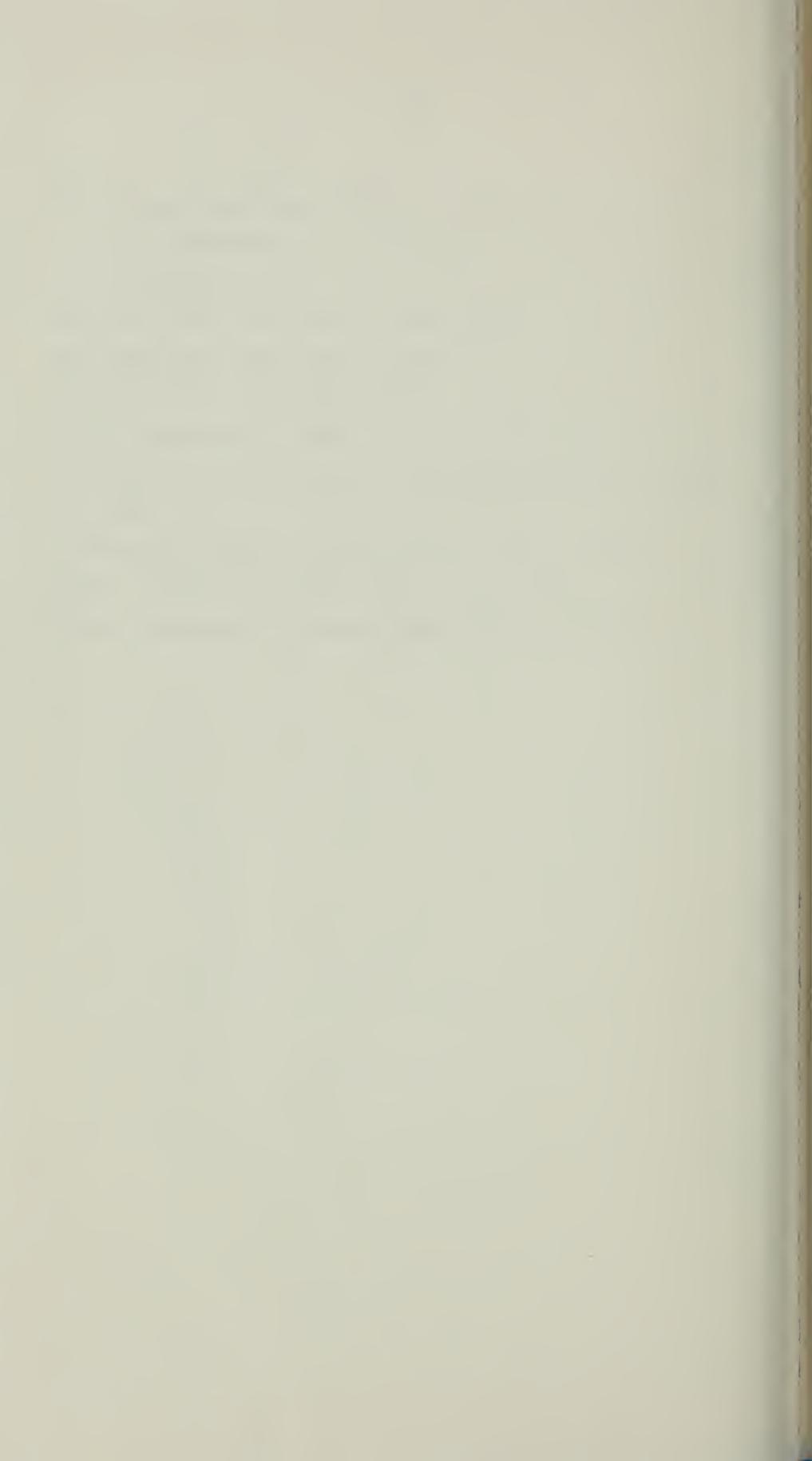
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APPELLANT'S OPENING BRIEF.

Proceedings Below.

The fundamental issue on this appeal is the interpretation of the California two-year statute of limitation (Cal. Code Civ. Proc., Sec. 339, subd. 1) and its application to plaintiff's complaint which charges the defendants with plagiarism and unfair competition.

In pertinent part, the statute reads as follows:

“§339. [Within two years.] Within two years:

1. An action upon a contract, obligation or liability not founded upon an instrument in writing.
. . .”

Plaintiff filed his complaint, containing three counts, in the District Court of the United States for the Southern District of California, Central Division, on January 19, 1955 [R. 14]. Shortly thereafter, the complaint was

amended, pursuant to stipulation, by substituting a new paragraph in the first count [R. 17-19]. Prior to any other proceedings, the appearing defendants moved to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. F. R. C. P. 12(b)(6). [R. 14-16.]

The defendants based their motion on several different grounds [R. 14-16.] The Court below denied the motion on all grounds, save one. On the basis of the California *two*-year statute of limitations (Code Civ. Proc., Sec. 339, subd. 1)* *alone*, the District Court granted the motion [R. 48-51]. Judgment of dismissal as to *all* counts followed [R. 50]. The judgment expressly holds unmeritorious all other grounds of dismissal urged by the appearing defendants [R. 49-50]. Plaintiff has appealed [R. 51, 57-58].

Jurisdictional Statement.

The jurisdiction of the District Court is based upon diversity of citizenship. (28 U. S. C., Sec. 1332(a)(1).) Paragraph I of the first count of the complaint discloses that plaintiff is a citizen of California [R. 3]. Paragraphs

*The judgment, at one point, inadvertently recites that plaintiff's causes of action are barred "by the provisions of California Code of Civil Procedure, Section 399 (*sic*) Subdivision 1" [R. 50, Part 3, first paragraph]. This was, undoubtedly, a typographical error. The second paragraph of Part 3 of the judgment correctly states the applicable section as "339 Subdivision 1" [R. 50]. Defendants motion to dismiss was based on section 339, subdivision 1 [R. 15]. Moreover, section 399 has no subdivisions and it is not a limitation statute.

Therefore, while we wish to direct the Court's attention to the error appearing in the judgment, we think that it is merely typographical. The intent of the Court below was clear: To hold unmeritorious all grounds urged for dismissal, except the ground based on California Code of Civil Procedure, Section 339, subdivision 1.

II and III of the first count of the complaint disclose that each defendant is a citizen of a State of the United States other than California or of a foreign country [R. 3-5]. The amount in controversy is alleged to be in excess of \$3,000, exclusive of interest and costs [Complaint, par. V, R. 5]. All of the above allegations are incorporated by reference in the second and third counts [R. 9-10, 11-12]. The appearing defendants did not contest the jurisdiction of District Court. Documents filed by them affirmatively show that each is a corporation, incorporated under the laws of a State other than California [R. 14-15].

This court has appellate jurisdiction, under 28 U. S. C. Sec. 1291, 28 U. S. C. Sec. 1294, to review the final judgment entered against plaintiff herein [R. 49-51]. The District Court Judge has, pursuant to stipulation, signed an appropriate certificate of finality under Federal Rule 54(b), determining that there is no just reason for delay and ordering the Clerk to enter the judgment against plaintiff as a final judgment [R. 56-57]. Rule 54(b) has recently been held valid by the Supreme Court, *Sears Roebuck & Co. v. Mackey*, 351 U. S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956) and *Cold Metal Process Co. v. United Eng. & Fdry. Co.*, 351 U. S. 445, 76 S. Ct. 904, 100 L. Ed. 1311 (1956).

The action, as will appear, is one involving multiple claims. The complaint contains three counts. The claims are based upon infringement of common law rights in literary property and upon unfair competition, involving *inter alia*, appropriation of the name of a musical property [R. 11]. Such an action is a "multiple" claim action consisting of separate, not joint, claims. *Collins v. Metro-Goldwyn-Mayer*, 106 Fed. 83 (2nd Cir., 1939), ap-

proved in *Reeves v. Beardall*, 316 U. S. 283, 284, 62 S. Ct. 1085, 1087, 86 L. Ed. 1478, 1479 (1942), and cited with approval in *Sears Roebuck & Co. v. Mackey*, 351 U. S. 427, 438, 76 S. Ct. 895, 901, 100 L. Ed. 1297, 1307 (1956); *Leo Fiest, Inc. v. Song Parodies*, 146 F. 2d 400 (2nd Cir., 1944); *American Broadcasting Co. v. Wahl Co.*, 121 F. 2d 412 (2nd Cir., 1941).

See, also the recent decision in *Cold Metal Process Co. v. United Eng. Fdry. Co.*, 351 U. S. 445, 452, 76 S. Ct. 904, 909, 100 L. Ed. 1311, 1318 (1956) affirming the right of the District Court Judge to determine the separability of the claims and to effectuate that determination by executing a certificate of finality. The judgment is, therefore, appealable and this court has appellate jurisdiction. (*Prickett v. Consolidated Liquidating Corp.*, 180 F. 2d 8 (9th Cir., 1950), as explained in *Steiner v. Twentieth Century Fox Film Corp.*, 220 F. 2d 105, 107 (9th Cir., 1955). See also: *United Artists Corp. v. Masterpiece Productions*, 221 F. 2d 213 (2nd Cir., 1955); *Colonial Airlines v. Janas*, 202 F. 2d 914 (2nd Cir., 1953); *Bendix Aviation Corp. v. Glass*, 195 F. 2d 267 (3rd Cir., 1952).

Statement of Facts.

The judgment from which this appeal is taken was entered after the granting of defendant's motion to dismiss. On such an appeal the appellate court must accept as true all the well-pleaded allegations of the complaint.

See:

Guessefeldt v. McGrath, 342 U. S. 308, 310, 72 S. Ct. 338, 340, 96 L. Ed. 342, 346 (1952);
United States v. New Wrinkle, 342 U. S. 371, 376, 72 S. Ct. 350, 353, 96 L. Ed. 417 (1952);

Yuba Consolidated Gold Felds v. Kilkeary, 206 F. 2d 884, 889 (9th Cir., 1953);
Tipton v. Bearl Spratt Co., 175 F. 2d 432, 435 (9th Cir., 1949), and cases there cited;
Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 200 F. 2d 876, 878 (2nd Cir., 1952);
Union Planters Nat. Bank v. Henslee, 166 F. 2d 993, 994 (6th Cir., 1948).

Moreover, *plaintiff is entitled to "the most favorable inferences" which can be drawn from the pleadings.* (*Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955).) *The case must be viewed "in the aspect most favorable to the plaintiff and most unfavorable to the defendant"* (emphasis supplied).

Woods v. Hillcrest Terrace Corporation, 170 F. 2d 980, 984 (8th Cir., 1948);
Continental Distilling Corporation v. Humphrey, 220 F. 2d 367, 371 (D. C. Cir., 1954);
Chicago & Northwestern Ry. v. First Nat. Bank, 200 F. 2d 383, 384 (7th Cir., 1952);
Federal Telephone & R. Corp. v. Associated Tel. & T. Co., 169 F. 2d 1012 (3rd Cir., 1948) (cert. den. 335 U. S. 859, 69 S. Ct. 133, 93 L. Ed. 406 (1948).)

On the basis of the pleadings, the facts before the Court are these:

In 1922, plaintiff, an internationally known producer of musical acts, sketches and revues, "originated, created and composed an unique, novel and original song and musical composition, with words and music, entitled WHERE IS YOUR HEART" [Complaint, pars. I, VI, R. 3-5-6]. Furthermore, plaintiff has, for many years, and in many

countries, sung his composition in nightclubs, music halls, theatres and hotels, as well as "other places of amusement and entertainment" [Complaint, par. VII, R. 6]. *Plaintiff has never in any form published the composition, and plaintiff has never, in any way, consented to, or authorized, the publication of his composition* [Complaint, par. VI, R. 6].

Plaintiff, at all times has owned and retained all common law rights in the composition [Complaint, par. VI, R. 6]. Plaintiff's composition was filed with the District Court as Exhibit A to the complaint [R. 6].

At all relevant times, each and every defendant "had full knowledge and notice of plaintiff's rights of ownership, and [his] exclusive rights of performance, use and exploitation" throughout the world [Complaint, par. VII, R. 6].

While using the same infringing song, the different defendants have invaded plaintiff's common law rights at different times and through several different media, such as motion pictures, radio, television, phonograph records, publication of sheet music, etc. The methods used to infringe, the manner of infringement, and the dates on which each of the infringements commenced are completely severable and vary with each different type and media of infringement. The respective differences in type of infringement and the approximate dates of commencement by each of the various defendants are alleged as follows:

1. *Infringement by Motion Picture Photoplay.*

Defendant Romulus Film Ltd. (hereinafter called "Romulus") produced and, in conjunction with defendant United Artists Corporation (hereinafter called "United

Artists"), released a motion picture photoplay entitled *Moulin Rouge*. In this film the infringing song, "WHERE IS YOUR HEART", also known as the "SONG FROM MOULIN ROUGE" was recorded and sung [Complaint, par. VIII, R. 6-7]. A copy of the sheet music of the infringing composition was filed in the District Court as plaintiff's Exhibit B [Complaint, par. XII, R. 9]. *This song "substantially copies and appropriates the words and music of plaintiff's original song and composition entitled 'WHERE IS YOUR HEART?'"* [Stipulation *re* amendment of Complaint, p. 2, lines 14-16, R. 17-18]. These defendants acted with full knowledge of plaintiff's exclusive rights in the composition [*id.* R. 17-18].

In Los Angeles County only, the film containing the infringing composition, was released on December 23, 1952 and its exhibition within Los Angeles County was continuous from that date until April 12, 1955, when the amendment to the complaint was filed [Stipulation *re* Amendment of Complaint, R. 18]. At a later date the film was released and exhibited in all other states of the United States and in all other parts of the world. This release commenced on February 1, 1953, *less than two years prior to the commencement of the action*, and has also been continuous [Stipulation *re* Amendment of Complaint, R. 18].

Defendants Romulus and United Artists caused the infringing song to be sung and performed as part of the exhibition of the motion picture at each public showing of the film during its continuous and world-wide exhibition [Stipulation *re* Amendment of Complaint, R. 18].

2. *Infringement by Publication of Sheet Music.*

“During the year 1953” [Complaint, par. IX, R. 7] and continuously thereafter, in Los Angeles County, and in other parts of the United States and the rest of the world, defendant Broadcast Music, Inc. (hereinafter called “BMI”) published or caused the publication of the infringing work in sheet music form [*id.*, R. 7]. Furthermore, BMI caused the sheet music to be used by professional entertainers and caused it to be “sold and distributed to the general public” [*id.*, R. 7].

Defendant BMI’s purported Certificate of Registration of Copyright, E Pub. 69688, on *The Song From Moulin Rouge* (WHERE IS YOUR HEART?) recites its first “publication” as occurring on *February 6, 1953, less than two years before the date of filing herein*. This certificate is, by stipulation, part of the record on appeal [R. 42-43], and is *prima facie* proof of the facts stated therein (17 U. S. C. 209, 61 Stat. 652).

3. *Infringement by Phonograph Records.*

Defendants London Record Sales, Inc., Brunswick Record Corporation, Capitol Records Distributing Co., Inc. of California, Capitol Records Distributing Co., Inc. of Georgia, Columbia Recording Corporation (a Delaware corporation), Columbia Recording Corporation (a New York corporation), Mercury Record Corporation, Mercury Record Distributors, Inc., RCA Victor Company, Inc., Radio Corporation of America, RCA Manufacturing Co., Inc. (This group of defendants is sometimes referred to as “the defendant record companies”), recorded the infringing song on phonograph records and caused the records to be “sold and distributed to the general public” in Los Angeles County and in each of the other United

States and elsewhere throughout the world. *This infringement began on February 1, 1953, less than two years before the complaint was filed, and has been continuous since said date* [Complaint, par. X, R. 7-8].

4. *Infringement by Radio Broadcast.*

Defendants Columbia Broadcasting System, Inc., National Broadcasting Company, Inc., and American Broadcasting Company, Inc. (sometimes hereinafter referred to as "the defendant broadcasting companies"), have caused the infringing work to be performed and broadcast over their broadcasting systems and over "hundreds of radio stations throughout the United States" and in Los Angeles County, California. *This infringement commenced on February 1, 1953, less than two years before the complaint was filed, and has been continuous thereafter* [Complaint, par. XI, R. 8-9].

Each infringement by each defendant in each media was committed with full notice and knowledge of plaintiff's rights [Complaint, par. XIII, R. 9]. Each of these infringements was committed without plaintiff's consent or authority [*id.*, R. 9]. The infringements are alleged to have damaged plaintiff in the sum of \$500,000.00, no part of which has been paid [*id.*, R. 9].

SECOND COUNT.

The second count is based on unfair competition. It incorporates by reference all of the facts set forth above, except the allegations of damage [Complaint, Second Cause of Action, par. I, R. 9-10], and adds the following:

Plaintiff's widespread performance and singing of his composition, throughout the world, for more than thirty years, has caused "thousands of persons in the entertain-

ment industry and hundreds of thousands of persons constituting the general public" to identify plaintiff's song and its title with plaintiff [*id.*, par. II, R. 10]. By reason thereof, a secondary meaning has attached to the song and to the title "WHERE IS YOUR HEART?" The entertainment industry and the general public have identified the same solely with the plaintiff [*id.*, R. 10].

Because of the acts of defendants, the entertainment industry and the general public have been confused and misled into believing that plaintiff did not originate and create the song "WHERE IS YOUR HEART?" By reason of this deception and confusion, caused by the defendants, plaintiff has been deprived of all recognition and credit as the composer, originator and creator of "WHERE IS YOUR HEART?" [*id.*, par. III, R. 10-11].

Plaintiff has been precluded from claiming ownership or title to the composition and has been unable to perform his composition for profit [*id.*, par. III, R. 11].

This deception and confusion of the general public and entertainment industry began during the year 1953 and has been continuous since that time [*id.*, par. III, R. 10].

In addition, defendants have unfairly competed with the plaintiff by their "use, advertising and exploitation of the *title* of plaintiff's original song and musical composition entitled "WHERE IS YOUR HEART?," after the secondary meaning had attached thereto and the title had become identified with plaintiff [*id.*, par. IV, R. 11].

By reason of defendants' unfair competition, plaintiff has been damaged in the sum of \$250,000, in addition to the damages incurred by reason of the facts alleged in the first count [*id.*, par. V, R. 11].

THIRD COUNT.

The third count seeks the equitable relief of injunction and accounting. The operative facts are primarily those which are alleged in the first and second counts. All of the allegations of those counts are incorporated by reference in the third count, except the allegations of damage [Complaint, Third Cause of Action, par. I, R. 11-12]. In addition, plaintiff alleges that defendants Romulus and United Artists have threatened to, and intend to, continue the release, distribution and exhibition of the film containing the infringing song. The other defendants have also threatened to, and intend to, continue their acts of infringement [*id.*, par. II, R. 12]. Unless the defendants are enjoined, plaintiff will suffer irreparable injury for which the remedy at law is inadequate [*id.*, par. III, R. 12].

Plaintiff also asks for the equitable remedy of an accounting of profits from each defendant, on the ground that they have secured, by means of their acts of infringement, "profits and privileges to which plaintiff is solely and exclusively entitled by reason of his ownership of" the musical composition "WHERE IS YOUR HEART?" [*id.*, par. IV, R. 12-13].

Specification of Errors.

Appellant specifies as error the following:

1. The granting by the District Court of defendants' motion to dismiss upon the ground that plaintiff's complaint, and each claim contained therein, and the entirety of each claim, was barred by the California two-year statute of limitation, Code of Civil Procedure, Section 339.1.
2. The judgment of dismissal entered against appellant and in favor of appellees based upon the District Court's conclusion that plaintiff's complaint and each count contained therein, and the entirety of each count, was barred by the California two year statute of limitations, Code of Civil Procedure, Section 339.1.

Questions Presented.

The questions presented by this case arise by reason of defendant's motion to dismiss [R. 14-16] and from the lower court's determination that all of plaintiff's remedies as to all defendants were barred by the statute of limitations [R. 49]. The lower court expressly ruled that all of the other grounds of defendants' motion were *not* meritorious [R. 49-50].

The sole issues on this appeal involve the applicability of the California statutes of limitations to the infringements committed by the various defendants.

The specific questions involved in this appeal are these:

1. Are plaintiff's "common law copyright" claims against defendants Romulus and United Artists wholly barred by the California two-year statute of limitations (Code Civ. Proc., Sec. 339.1) although such claims are based on a series of separate torts, which are alleged to have been continuing and repeated until the date the complaint was filed?

2. Are plaintiff's "common law copyright" claims against each of the other defendants barred by the California two-year statute of limitations (Code Civ. Proc., Sec. 339.1) although *none* of these defendants are alleged to have committed a single infringing act prior to two years before the commencement of this action and *no* cause of action accrued to plaintiff except within the limitations period?

Are these claims barred although the separate torts of these defendants were continuing and repeated until the amendment to the complaint was filed?

3. Are plaintiff's claims of unfair competition barred although nothing in the record shows that a single tort of unfair competition was committed except within the limitations period?

Are these severable claims barred although each series of torts was continuing and repeated by each different defendant until the date the action was commenced?

4. Are plaintiff's claims for equitable relief barred although his legal remedies are not?

a. Are plaintiff's claims for injunctive relief against future torts barred by any statute of limitation? If any statute of limitation is applicable, are plaintiff's claims subject to the two-year statute of limitations or subject only to the four-year statute which applies to actions "*for relief* not hereinabove provided for." (Emphasis added; Cal. Code Civ. Proc., Sec. 343.)

b. Are plaintiff's claims for an accounting of profits barred by any statute of limitation of a period less than four years?

ARGUMENT.

Introduction and Summary.

The record in this case is crystal clear. The complaint was filed on January 19, 1955. The sole statute invoked by the defendants was California Code of Civil Procedure, Section 339.1 [R. 15]—a two year statute. Only one act participated in by but two defendants was commenced prior to January 20, 1953, the beginning of the two year period. That one act was the release and exhibition of the film, *only in Los Angeles County*, in December of 1952. It is specifically alleged that the film was first exhibited outside of Los Angeles in February, 1953 and was continued in release by defendants Romulus and United Artists from then to the date the amendment to the complaint was filed [April 12, 1955, R. 18]. The infringement of plaintiff's rights by these two defendants was in the nature of a series of continued and repeated torts. Under such circumstances, the sole effect of a statute of limitations would be to make unrecoverable those damages suffered by plaintiff prior to January 20, 1953.

But, of much greater significance in this case are the plain facts that *no cause of action or claim arose or could have arisen against any other defendant until after January 20, 1953*. No claim could have been prosecuted by plaintiff against the other defendants prior to that date and no statute of limitations can, therefore, bar plaintiff's remedies.

No cause of action against BMI could arise before it commenced publication of the sheet music. By its own admission, that date was February 6, 1953 [R. 43], *within any two year limitations period*.

No cause of action could arise against any of the defendants record companies until it manufactured or sold phonograph records reproducing the infringing composition. This first commenced on or about February 1, 1953 [R. 7-8], *within any two year limitation period*.

No cause of action against the defendant broadcasting companies could arise before they first broadcast the infringing composition. The first such date alleged in the complaint is February 1, 1953 [R. 8-9] *within any two year limitation period*.

The simple truth is that plaintiff had no cause of action for infringement of his common law rights against defendant BMI (the distributor of the sheet music), or against the defendant record companies, or against the defendant broadcasting companies *until after February 1, 1953*. These defendants had done nothing to infringe plaintiff's rights prior to that date and no cause of action had accrued. Plaintiff filed his action on January 19, 1955, *within* the limitations period for an action for damages for infringement of common law musical property rights.

Moreover, these torts were continuing and repeated in nature, lasting until the complaint was filed. On any analysis, plaintiff's claims against these defendants are not barred.

A cause of action or claim for unfair competition is different from a claim for infringement of common law copyright. It may, as is alleged in this case [R. 10-11], contain the element of confusion of the public. Plaintiff, in his second count, pleads that this cause of action came into existence "during the year 1953" [Complaint, Second Cause of Action, par. III, R. 10], when the public and

the entertainment industry were first confused and misled by defendant's acts. There is no date in the record of this case to establish that public and industry confusion came into being before January 20, 1953, the date of the commencement of the limitations period. Defendants have not, by affidavit, or otherwise, supplied such a date. The sole date put into the record by any defendant is the date of first publication of the infringing sheet music. *That date is February 6, 1953*, within the two year period [R. 42]. As to appropriation of plaintiff's title and the unfair competition resulting therefrom, the Complaint discloses February 1, 1953 as the date appropriation began [R. 11].

There is not one date, or one fact, in the record of this case which could bar plaintiff's second count.

The third count seeks the equitable relief of injunction and accounting based primarily on the facts alleged in the first two counts. Since the legal rights which may be subject to a two years statute, are not barred, the equitable rights may, in any event, be enforced. Moreover, even if the legal rights are wholly or partially barred, the equitable rights under California law are amenable only to the four year statute of limitations (Cal. Code Civ. Proc., Sec. 343). Furthermore, by an unbroken line of decisions, plaintiff's right to an accounting is subject only to the four year statute.

If any of these arguments are well-taken—and we submit that they all are meritorious—plaintiff is entitled to a reversal and to a trial on the merits.

I.

Plaintiff Has Full Rights and Remedies to Redress Those Infringements of His Common Law Rights Which Occurred Within Two Years Next Preceding the Commencement of the Action, Against the Defendants Who Produced, Released and Exhibited the Motion Picture.

This section of the brief deals solely with the liability of defendants Romulus and United Artists. Romulus produced the motion picture "MOULIN ROUGE." On or about the 23rd day of December, 1952 Romulus and United Artists first released the film. Continuously since that date these two defendants "distributed and caused to be exhibited in the County of Los Angeles, State of California" the motion picture MOULIN ROUGE [R. 18]. Release, distribution and exhibition outside of California commenced February 1, 1953 and has been continuous since that date [R. 18].

The defendants have argued that the initial exhibition sets the date on which *all* liability was incurred as to *every* defendant. They have argued that the statute of limitations as to *all* liability commenced to run on that date. They have argued that all of plaintiff's remedies against all of them were barred two years from the date of the first showing of the motion picture. They have argued it is immaterial that exhibition was continuous from that date until the amendment to the complaint was filed [April 18, 1955, R. 19] or that other infringing acts occurred within the two-year limitations period.

The defendants have contended that the California decision of *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal. App. 2d 464, 114 P. 2d 370 (1941), conclusively establishes their contentions.

A. The Italiani Case Expresses No Opinion on the Issue of Continued and Repeated Infringement Presented by the Instant Case and Does Not Control the Decision Here.

The *Italiani* case should be carefully analyzed in its relationship to the appeal now before this Court. At the outset it should be noted that the opinion in the *Italiani* case strongly resembles a decision under certified question procedure. The sole issue presented to the Court by the briefs was: Which section of the California Code of Civil Procedure applied to actions for plagiarism? As stated by respondents:

“. . . appellant's brief correctly sets forth that the *sole* question to be determined is whether section 338(3) or 339(1) of Code of Civil Procedure is the applicable statute of limitations in the case at bar.” Respondents Reply [*sic*] Brief (p. 1), (emphasis supplied).

Plaintiff-appellant contended the three-year statute, Code of Civil Procedure, Section 338, subdivision 3 applied (see App. Op. Br.). Defendants-respondents argued that the two year statute, Code of Civil Procedure, Section 339, subdivision 1, was the pertinent legislation. The District Court of Appeal itself described the controversy in this manner (45 Cal. App. 2d 464, 465, 114 P. 2d 370, 371 (1941)), and held for the respondents.

As the question came before the District Court of Appeal, that Court decided the only issue presented to it: which code section was applicable? Appellant's attorney, in his brief in the *Italiani* case did not mention the fact that the amended complaint alleged that exhibition had been continuous within the past three years. Respondents (with good reason) also failed to mention this allegation. The Court quotes substantially all of the paragraph of

the amended complaint which deals with time (45 Cal. App. 2d 464, 465, 114 P. 2d 370, 371-372 (1941)), and then resumes its discussion as to which code provision should be applied to plagiarism actions. No one—parties or judges—discussed the problems arising from the allegation of continuous exhibition.

Plaintiff-appellant did not petition for a rehearing. He did not petition for a hearing by the California Supreme Court. The limitations question of the *Italiani* case has never been presented to the California Supreme Court and has never been reaffirmed in the State's intermediate appellate courts. The limitations questions raised by the instant case and discussed in this brief have not been considered in any California decision of which we are aware.

The limitations question of the *Italiani* case in its relationship to continued exhibition has been discussed in but one reported decision. In that case a distinguished and extremely able judge of the Federal District Court held in accordance with the contentions advanced in this brief. District Judge Yankwich held, in *Cain v. Universal Pictures Co.*, 47 Fed. Supp. 1013 (D. C. Cal., 1942), that where exhibition of an infringing film was continuous, *the plaintiff's claim was NOT barred by the statute two years after first release of the film.* The statutory period was extended by the continued invasion of plaintiff's rights. The *Cain* case is more fully discussed below.

The defendants here have also urged, in effect, that because this is a diversity case, *Italiani* produces a complete paralysis of the Federal Judiciary and requires (on the basis of a point not even discussed in the decision) a judgment in their favor.

We do not agree. We submit that both reason and unimpeachable authority require reversal.

That state statutes of limitation apply in diversity cases has been long established under the Rules of Decision Act, Section 34 of the Judiciary Act of 1789. 1 Stat. 92; 28 U. S. C. 1652. But in the matter of interpretation of those statutes, the United States Supreme Court has stated that federal courts would be governed by state statutes of limitation "as construed by its [the state's] *highest court*." (Emphasis supplied.) See *e.g. Bauserman v. Blunt*, 147 U. S. 647, 652-653; 13 S. Ct. 466, 469, 37 L. Ed. 318 (1893) and cases there cited; *Metcalf v. City of Watertown*, 153 U. S. 671, 673, 14 S. Ct. 947, 948, 38 L. Ed. 861, 863 (1894); *Van Dyke v. Parker*, 183 Fed. 35, 37 (9th Cir., 1936). The *Italiani* case was decided by an intermediate state court.

Moreover, the Supreme Court of the United States has not been reluctant to distinguish state Supreme Court decisions. It has not been reluctant to ignore state Supreme Court *dicta* which, if applied, would be dispositive of the issue before the Court. See *e.g. Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 9 S. Ct. 690, 692, 32 L. Ed. 1080, 1082 (1889). And federal courts have thoroughly examined the meaning and intent of state court decisions before applying them in statute of limitations cases. See *e.g. Metcalf v. City of Watertown*, 153 U. S. 671, 14 S. Ct. 947, 38 L. Ed. 361 (1894).

In a federal district court decision, which has been cited with approval by this Court, the notion that federal courts

are completely controlled by the limitations decisions of intermediate state appellate courts was firmly rejected. Moreover, it was held that Federal Courts are *not* bound by the decisions of intermediate State Courts which are not definitive on the precise issue before the federal court. Nor are federal courts bound by state court *dicta*, or by implications from decisions.

“Nor are the federal courts controlled by mere *dicta* of a state court. *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936; *Matz v. Chicago R. R.* (C. C.) 85 Fed. 180; *In re Sullivan*, 148 Fed. 815, 78 C. C. A. 505; *Southern R. R. v. Simpson*, 131 Fed. 705, 65 C. C. A. 563. *Nor does a construction of statute, based merely upon implications from the language of a judicial opinion, control the federal court.* *Caesar v. Capell* (C. C.) 83 Fed. 403; *Adelbert College v. Wabash R. R.*, 171 Fed. 810, 96 C. C. A. 465, 17 Ann. Cas. 1204.” (Emphasis supplied.)

Graham v. Englemann, 263 Fed. 166, 168 (D. C. Tex., 1920), cited and relied upon by this Court in *Van Dyke v. Parker*, 83 Fed. 35, 37 (9th Cir., 1936).

Under these precedents, the federal courts are not paralyzed by a state court decision, which does not even purport to rule on a principal contention made here by plaintiff. When a question has not been expressly ruled upon, the federal courts, sitting as “another court of the State” (see *Holmberg v. Armbrecht*, 327 U. S. 392, 394, 66 S. Ct. 582, 583, L. Ed. 743, 746 (1946)) are as free as state courts to examine precedents and weigh reasons in reaching a decision.

B. These Defendants Have Committed Continued and Repeated Infringements Upon Plaintiff's Common Law Rights. Plaintiff May Recover for Such of These Torts as Occurred Within the Limitation Period.

The record in this case is clear. Defendants Romulus and United Artists, *continually* distributed and exhibited the film, *Moulin Rouge*, for the two year period next preceding the filing of the complaint [R. 17-18]. That initial release of the film took place more than two years before filing, is a fact which may bar the recovery of damages incurred in the short period previous to the commencement of the two-year period. But it is no ground for barring the action.

The damaging act of public exhibition or distribution has always been the essential element of a cause of action for invasion of common law rights in literary, artistic or musical property. Infringement of common law rights in literary or musical property (or, as it is sometimes called, "common law copyright") is a tort. *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 784, 256 P. 2d 947, 953 (1953) and the defendants participating therein are tort feasors. *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. 2d 556, 559, 90 P. 2d 371, 373 (1939). Moreover, an action to recover damages for infringement of common law copyright has always been considered an action for consequential damage and, therefore, in the nomenclature of the old forms of action, "an action on the case". *Donaldson v. Beckett*, 4 Burr. 2408, 98 E. R. 257 (1774); 13 *Corpus Juris*, 1190 and cases there cited; *Atwill v. Ferrett*, 2 Fed. Cas. 195 (Case No. 640, 2 Blatch 39 (C. C. S. D. N. Y., 1846)); *Drone, Copyrights*, 495.

On fundamental principles, therefore, *damage* has always been an integral element of the cause of action.

Golding v. R.K.O. Pictures, 35 Cal. 2d 690, 696, 221 P. 2d 95, 97 (1950):

“The rights asserted in this case are not based upon statutory copyright but stem from the so-called common-law copyright. (Civ. Code §980.) Upon such a cause of action, to recover for infringement, or piracy, of literary property, three elements must be established: (1) ownership by the plaintiff of a protectible property interest; (2) unauthorized copying of the material by the defendant; and (3) damage resulting from the copying. (See *Caruthers v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906, 907.)”

See also, 34 *Am. Jur.* 416-417.

In *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017-1018 (D. C. Cal., 1942) it was held that:

“So the wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.” (Emphasis supplied.)

This language has been quoted and approved by this Court. (*Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F. 2d 354, 365 (9th Cir., 1947).)

The exhibition of the film is the essential damaging act. *In the instant case the damage by exhibition arises from the performance of plaintiff's song in the motion picture produced and released by defendants Romulus and United Artists* [R. 17-18].

It is well-established that each invasion of exclusive rights to literary or musical property is a separate damaging act, a separate infringement and a separate tort.

“The number of infringements by public performance of a copyrighted musical or dramatic composition, or of a copyrighted motion-picture photoplay, is equal to the number of unlicensed performances.”

Ball, *Law of Copyright and Literary Property*, 636.

“When the defendants had exercised the license, it was exhausted, and the alleged exhibition [of the motion picture] on an additional day constituted both a breach of the contract and a trespass upon the monopoly conferred upon the plaintiff by the copyright.”

Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co., 3 Fed. Supp. 66, 74 (D. C. Mass., 1933).

In *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 204, 205, 51 S. Ct. 407, 408, 75 L. Ed. 978, 980 (1931) the Supreme Court, per Justice Brandeis stated:

“It was settled in *Westerman Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499, which dealt with the infringement by a newspaper of the monopoly of copying, that *for each publication \$250 is the minimum damages. An unbroken line of decisions in the lower courts has since held that the rule declared in the Westerman Case is applicable also to infringement of the monopoly of giving public performance.*” (Emphasis supplied.)

The Court held that the rule applied to performance by radio broadcasts and radio loudspeakers.

The holding of the *Jewell-LaSalle* case was applied to infringing performance by means of motion picture ex-

hibition in *Tiffany Productions v. Dewing*, 50 F. 2d 911, 917 (D. C. Md., 1931), cited with approval by this Court in *Universal Picture Co. v. Harold Lloyd Corporation*, 162 F. 2d 354, 359, 367 (9th Cir., 1947). See also *Law v. National Broadcasting Co.*, 51 Fed. Supp. 798 (D. C. N. Y., 1943), holding that a radio network is responsible and liable for *each* broadcast over *each* of its local stations.

It would unnecessarily prolong this brief to multiply authorities on a proposition so well-established.

Each performance damaged plaintiff. Each performance constituted an infringement. The tort of these defendants, in causing continued exhibition of the film [R. 17-18], is one which is repeated and continuing in nature. *On such a record, the authorities are clear that plaintiff is entitled to recover damages for every performance which occurred within the two years next preceding the filing of the complaint.* The law of California is well-settled on this subject:

Trombley v. Kolts, 29 Cal. App. 2d 699, 708, 85 P. 2d 541, 545 (1938):

“Where the tort is continuing, the right of action is also continuing.”

Phillips v. City of Pasadena, 27 Cal. 2d 104, 107-108, 162 P. 2d 625, 626-627 (1945):

“On the other hand, if the nuisance may be discontinued at any time it is considered continuing in character. (*Kafka v. Bozio*, 191 Cal. 746, 751, 218 P. 753, 29 A. L. R. 833; *Strong v. Sullivan, supra.*) Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original

wrong may be barred. (*Kafka v. Bozio*, 191 Cal. 746, 751, 218 P. 753, 29 A. L. R. 833); *Strong v. Sullivan*, 180 Cal. 331, 334, 181 P. 59, 4 A. L. R. 343); 2 Wood on Nuisances (3d ed.), p. 1308; to the same effect are: *Vowinkel v. N. Clark & Sons*, 216 Cal. 156, 164 (13 P. 2d 733); *Collins v. Sargent*, 89 Cal. App. 107, 116 (264 P. 776); *Williams v. Blue Bird Laundry Co.*, 85 Cal. App. 388, 395; 259 P. 484; cf. *Knight v. City of Los Angeles*, 26 Cal. 2d 764, 160 P. 2d 799; *Natural Soda Prod. Co. v. City of Los Angeles*, 23 Cal. 2d 193, 143 P. 2d 12.

“We cannot say, as a matter of law, that the locked gate constituted a permanent nuisance, since it appears from the allegations in the complaint that it could have been removed at any time. If the nuisance was in fact continuing in character, the claim was filed within time.” (Emphasis supplied.)

Obviously, in the instant case, there was no “permanency” in the infringements of these defendants. The infringement easily could have been discontinued at any time.

See, also:

Kafka v. Bozio, 191 Cal. 746, 218 Pac. 753 (1923);
Carbine v. Meyer, 126 Cal. App. 2d 386, 390, 272 P. 2d 849, 853 (1954):

“In all cases of doubt respecting the permanency of the injury, the courts are inclined to favor the right to successive actions. (*Kafka v. Bozio*, *supra*, p. 752.)”

Cf. Komoff v. Kingsbury Cotton Oil Co., 45 Cal. 2d 265, 268-271, 288 P. 2d 507 (1955).

The rule applicable here is fully and correctly stated in 34 *Am. Jur.* 127:

“In case the wrongful act is continuous or repeated, so that separate and successive actions may be instituted for the damages as they accrue, and as to such actions for subsequently accruing damages, *the statute of limitations does not run from the date when the first wrong was suffered, but only from the successive dates of the accrual of such damages.*” (Emphasis supplied.)

These cases and authorities undoubtedly formed one of the bases of Judge Yankwich’s decision in *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017-1018 (D. C. Cal., 1942), which was quoted and approved by this court in *Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F. 2d 354, 365 (9th Cir., 1947). In the *Cain* case, Judge Yankwich specifically points out that the first release of the film there involved occurred *more than two years before the action was commenced.* (47 F. Supp. 1013, 1017.) He specifically recognizes the *Italiani* case (p. 1017). Then he holds that:

“Therefore, conceding that the actual distribution of the picture, following its original release, was done by others than [the writer], *the action is not barred, as to him, by the expiration of two years from the date of release.* For the *continuous exhibition* of the picture is one of the aims of the composition of the script by him.” (Emphasis supplied.) (P. 1018.)

So, here, equally, one of the obvious aims of production and release was continuous exhibition.

An almost identical ruling was made by Chief Justice Taney over 100 years ago in *Reed v. Carusi*, 20 Fed. Cas. p. 431, 432 (No. 11,642) (C. C. D. Md., 1845):

“If the jury find against the defendant upon the two preceding instructions, yet he is not liable in this action, unless he was guilty of the infraction of the copyright within two years before this action was brought; but if the plates were engraved more than two years before, *yet every printing for sale caused by the defendant, would be a new infraction of the right; and if such printing was within two years before the suit was brought, the defendant is liable in this action.*” (Emphasis supplied.)

Within the meaning of the precedents, there was, in this case, no permanency in defendants’ tort. Exhibition of the film could have been discontinued at any time. The infringing portions of the film could have been deleted at any time. The tortious conduct could have been stopped at any time. But it was not. The tortious conduct continued and the tort was continuous. Plaintiff has specifically so alleged. [R. 17-18.] Moreover the tort by its very nature was repetitious. If there is any doubt on this point, the cases cited above, and the well-established rules which guide this Court in reviewing judgments entered on motions to dismiss (*supra*) require the doubt to be resolved in the favor of plaintiff.

C. Contrary to Defendants' Argument in the Court Below, Defendants' Infringement Could Not and Did Not Constitute an Abandonment and Publication by Plaintiff, Barring Him From Maintaining This Action.

In fairness to the district court judge, we feel that some mention should be made of the argument advanced by defendants in the court below. While the judge wrote no opinion in the case, defendants advanced but one argument that attempted to free them from the operation of the well-established principles relied on by plaintiff. This argument of defendants must have influenced the decision below.

The defendants' argument was this:

“The difficulty with the plaintiff here is that he [plaintiff] confuses a statutory cause of action under Title 17, U. S. C. A. for infringement of statutory copyright with an action under California Law for the taking of plaintiff's common law intellectual property. *It is absolutely true that under federal statutory copyright each new exhibition by defendant constitutes a new infringement and gives rise to a new cause of action and starts the running of the statute of limitations all over again. But this is by virtue of the statute, Title 17, U. S. C. A., Section 101. There is no comparable statute in California.* The action by plaintiff in the case at bar, therefore, is no different than any other action for the taking and use of personal property.” (Emphasis partially added.) (Closing Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, p. 10, line 3, to p. 11, line 10.)

[Of course, the *Italiani* case, *supra*, so heavily relied on by defendants, held exactly the opposite. It specifically

held that the action is quite different from a taking and use of tangible personal property.]

In the lower court, the defendants summarized their position as follows:

“The reason for the distinction (which plaintiff ignores) between violation of federal statutory copyright is that at common law an author had no right in his intellectual creations except the right of first publication, and once the material was published the author’s rights therein were lost unless statutory copyright was obtained Consequently, when defendants publish a motion picture allegedly containing plaintiff’s common law intellectual property, and plaintiff’s common law intellectual property is thereby published, or made “public”, plaintiff’s remedy is an action for damages for *conversion* of his property. The statute of limitations therefore commences to run upon the first publication by defendant of plaintiff’s work, and is not extended by subsequent publications, because the cause of action resulting from each subsequent publication exists only by virtue of statutory provisions. (See 17 U. S. C. A. Section 101.)” (*Id.* p. 13, line 12, to p. 14, line 13, emphasis supplied.)

Of course, common law copyright includes a great deal more than merely the right of first publication, see *e.g.* Amdur, *Copyright Law and Practice*, 35-64 (1936); 18 C. J. S. 139-141. It has often been described as being “of a wider and more exclusive nature than rights conferred by statutory copyright”. *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 661, 221 P. 2d 73, 78 (1950); *Yadkoe v. Fields*, 66 Cal. App. 2d 150, 160, 151 P. 2d 906, 911 (1944); 18 C. J. S. 138, 139. Further-

more, if defendants contention were correct and the action should be brought for "conversion" of his property, the three year statute, California Code of Civil Procedure, Section 338(3) should apply. If that were true, defendants would have absolutely no defense based on the statute of limitations.

But even aside from this, the artfully phrased but erroneous argument of defendants must fail if any of its premises are unsound and, we submit, *each* of defendants' premises are unsound:

FIRST: Defendants say that the right to recover for repeated violations depends solely upon the federal copyright laws and does not exist at common law. They have cited no authority for this proposition and, to our knowledge none exists.

We have discussed at length, *supra*, the California law and the common law dealing with the nature of plaintiff's cause of action and the continuing and repeated torts committed by defendants. There is no reason advanced by defendants for not applying the same rules to the torts of repeated infringements of plaintiff's common law rights in literary or musical property.

SECOND: The next confusion relied on by defendants is the argument that somehow plaintiff's rights could become dedicated by the *unlicensed and unauthorized* infringements which occurred in this case. It is incontestably the law that a performance, *without the consent of the owner of the common law rights*, is not a general publication and *does not result in dedication of those rights*.

Stanley v. Columbia Broadcasting System, 35 Cal. 2d 653, 661, 221 P. 2d 73, 78 (1950):

“The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, and the common-law right is perpetual, existing until lost or terminated by the *voluntary act* of the owner.” (Emphasis supplied.)

Amdur, *Copyright Law & Practice*, 56 (1936):

“Common law rights are not destroyed by a publication not authorized by the author thereof.”

Nimmer, *Copyright Publications*, 56 Col. L. Rev. 185, 187 (1956);

National Comics Publications v. Fawcett Publications, 191 F. 2d 594 (2nd Cir., 1952) (per L. Hand, Jr.);

United States v. Certain Parcels of Land, F. R. D. 224, 234-235 (D. C. Cal., 1954);

18 C. J. S. 158.

These authorities and countless others all stand for the proposition that *a performance without consent of the owner cannot dedicate the owner's property rights*.

It is also incontestably the law that infringement is different from publication. Aside from the simple distinction pointed out above *i.e.*, publication requires *consent* and infringement involves *lack of consent*, the two concepts are fundamentally and completely different. Thus, from an early date, public performance of a song, by one who did not have the consent of the owner of the common law rights, constituted infringement.

Drone, *The Law of Property in Intellectual Productions*, 107 (1879):

“The owners’ common law rights are invaded when, without his consent, his manuscript is published in print, *when his dramatic or musical composition is publicly performed*, or when copies of his work of art are either publicly circulated or exhibited.” (Emphasis supplied.)

This rule, of course, forms the basis of many of the California common law right decisions. See, e.g. *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. 2d 556, 90 P. 2d 371 (1939); *Golding v. R.K.O. Pictures, Inc.*, 35 Cal. 2d 690, 221 P. 2d 95 (1950).

But it is equally clear that public performance of a musical or dramatic composition *by the owner of the common law rights, or with his consent*, does not dedicate.

Shafter, *Musical Copyright* 130, 131 (1939):

“*Performance* is one of those acts which do not result in loss of rights. Performance of a musical or dramatic work is not tantamount to publication—a rule observed throughout the world.”

Golding v. R.K.O. Pictures, Inc., 35 Cal. 2d 690, 693, 221 P. 2d 95, 96 (1950);

Ferris v. Frohman, 223 U. S. 424, 435-436, 31 S. Ct. 263, 266, 56 L. Ed. 492, 497 (1912):

“At common law, the public performance of the play is not an abandonment of it to the public use. *Macklin v. Richardson*, 2 Ambl. 694, 7 Eng. Rul. Cas. 66; *Morris v. Kelly*, 1 Jac. & W. 481, 21 Revised Rep. 216; *Boucicault v. Fox*, 5 Blatchf. 87,

97, Fed. Cas. No. 3,441; Palmer v. DeWitt, 2 Sweeny, 530, 47 N. Y. 532, 7 Am. Rep. 480; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480. Story states the rule as follows: 'So, where a dramatic performance has been allowed by the author to be acted at a theater, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theater without the consent of the author or proprietor; for his permission to act it at a public theater does not amount to an abandonment of his title to it, or to a dedication of it to the public at large.' 2 Story, Eq. Jur. §950."

McCarthy & Fischer, Inc. v. White, 259 Fed. 364, 365 (D. C. N. Y., 1919) (per A. N. Hand, J.):

"It is, however, well settled that the public performance of a dramatic or musical composition is not an abandonment of the composition to the public. *Ferris v. Frohman*, 223 U. S. at page 435, 32 Sup. Ct. 263, 56 L. Ed. 492; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Palmer v. DeWitt*, 47 N. Y. at page 543, 7 Am. Rep. 480; *Thomas v. Lennon* (C.C.) 14 Fed. at page 851; *Carte v. Ford* (C.C.) 15 Fed. at page 442."

See also:

Patterson v. Century Productions, 93 F. 2d 489 (2nd Cir., 1937).

Publication is not in itself an issue on this appeal. The lower court specifically held that plaintiff's rights had *not* been lost by publication [R. 49-50]. Further citations on this point are therefore, unnecessary. The authorities set forth are sufficient to underscore the

difference between the concepts of infringement and dedication. *They demonstrate that defendants cannot rely on their own infringement, to constitute a dedication and loss to plaintiff of his valuable property rights.*

THIRD: The federal authorities cited by plaintiff are applicable. Defendants argue that federal cases decided under the copyright statute are inapplicable to a case involving common law compyright. A conclusive refutation of this argument is found by looking at the California "common law" literary property decisions. Time after time these decisions cite, rely on, and quote from cases decided under the federal statute.

See *e.g.*:

Weitzenkorn v. Lesser, 40 Cal. 2d 778, 789, 791, 256 P. 2d 947, 955, 956 (1953);

Stanley v. Columbia Broadcasting System, 35 Cal. 2d 653, 660, 661-662, 221 P. 2d 73, 77, 78, 80-81 (1950).

The general authorities are in accord.

34 *Am. Jur.* 448:

"In the first place, it may be observed, *there is no distinction between an infringement of right at common law and of the copyright under the statute in literary or artistic works.*"

Warner, *Radio and Television Rights*, 540 (1953):

"Courts apply the same standards or tests for infringement for common law as for statutory copyright."

And this is especially true when the same specific right is in issue in the common law copyright case as in the federal case relied upon as authority. In one of the leading federal cases announcing the doctrine of multiple infringement, *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 204-205, 51 S. Ct. 407, 408, 75 L. Ed. 978, 980 (1931), the right involved was, in the words of Mr. Justice Brandeis, “*the monopoly of giving public performance.*”

This right exists also as a common law right. (*Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 18 (2d Cir., 1906), Aff'd 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086 (1908); *Werckmeister v. American Lithograph Co.*, 134 Fed. 321, 323, 324 (2nd Cir., 1904); Amdur, *Copyright Law and Practice*, 62-64 (1936).) This is one of the many common law rights asserted by plaintiff in this case. The federal cases may not be distinguished simply by saying that they were decided under a statute, when there is no applicable distinction in the rights involved or the nature of the invasion of those rights. The federal precedents are persuasive.

* * * * *

Each step in defendant's argument crumbles. It is completely without support in reason or authority.

We submit that, for the reasons stated, and based on the authorities cited, the judgment should be reversed.

II.

Plaintiff's Claims, Based on Infringement of His Common Law Rights, Against Defendant Music Publisher (BMI), Defendant Record Companies, and Defendant Broadcasting Companies, Are Not Barred by Any Statute of Limitations.

It is basic that no statute of limitations begins to run until a cause of action accrues to the plaintiff.

California Civil Code, Section 312:

“Civil actions, without exception, can only be commenced within the periods prescribed in this title, *after the cause of action shall have accrued*, unless wherein special cases, a different limitation is prescribed by statute.” (Emphasis supplied.)

Irvine v. Bossen, 25 Cal. 2d 652, 658, 155 P. 2d 9, 13 (1944):

“It is a fundamental principle in determining when the statute of limitation commences to run, that it runs from the time a cause of action accrues and it invariably accrues when there is a remedy available. (16 Cal. Jur. 488-490.) Hence, the pertinent inquiry is, the nature of the remedies available to the bondholder.”

Lubin v. Lubin, 144 A. C. A. 898, 906 (1956):

“It is hornbook law that the statute of limitation begins to run in any case upon the accrual of a cause of action, *which means a present right to sue thereon*. (*Maguire v. Hibernia S. & L. Soc.*, 23 Cal. 2d 719, 733 [146 P. 2d 673, 151 A. L. R. 1062].)” (Emphasis supplied.)

See also:

16 Cal. Jur. 488-490.

This action was commenced on January 19, 1955 [R. 14]. *Neither* defendant BMI, *nor* any of the defendant record companies, *nor* any of defendant broadcasting companies, committed any infringing act until *after* February 1, 1953. Defendant BMI, by its own admission, first infringed on February 6, 1953 [R. 42-43]. The defendant record companies and broadcasting companies began their infringements on February 1, 1953 [R. 7-8, 9-10]. Insofar as these defendants are concerned, they have committed no tort except within the two-year limitations period. No cause of action had accrued to plaintiff against them, except within that period, and no statute of limitations bars plaintiff's present action against them.

These defendants argued in the lower court that because they printed, sold and performed the same song as was performed in the motion picture, *Moulin Rouge*, their rights were "derived from and subordinate to the rights of the defendants Romulus and United Artists Corporation" Defendants' Answer to Plaintiff's Reply Brief . . . p. 8, lines 29-30), and that, therefore, plaintiff's cause of action was "to the same extent barred by the statute of limitations" (*id.*, p. 9, line 4.)

This argument is based on the fallacy that plaintiff has no remedy against Romulus and United Artists for *subsequent* torts committed solely by such defendants or which they authorize, or commit jointly in conjunction with other defendants. It must fall for that reason alone.

In addition, it should be pointed out that the argument is erroneous for several other reasons as well:

1. There is nothing in the record which establishes, or even suggests that the rights, if any, of the other defendants were derivative or subordinate. While these

defendants argue from the nature of the infringing sheet music [Ex. B] that the infringing song used by them came from the film, there is nothing that establishes or tends to establish that these defendants or any of them derived their rights, if any, from the defendant producer, Romulus, or the defendant distributor, United Artists. For aught that appears in the record, all of these defendants may have obtained an invalid license from the "composer" of the infringing work, or they may have infringed without putative rights of any sort. In any event, on this review plaintiff is entitled to "the most favorable inferences" which can be drawn from the pleadings (*Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955)) and defendants are not entitled to compel the Court to accept any inference such as the one on which this argument is predicated, based on surmise and conjecture.

2. Even if these defendants had copied from the work which appeared in the film it would not excuse them.

Wihtol v. Wells, 231 F. 2d 550, 553 (7th Cir., 1956):

"Defendant claims that he obtained the words which he used in his song from a poem composed by one Anna Johnston entitled 'My God and I' published in a church bulletin dated October 31, 1949. As this date is long after plaintiff's work had become widely and favorably known, it doesn't make much difference whether defendant copied from plaintiff or whether defendant copied from Johnston who copied from plaintiff."

3. As a matter of law, even if the "rights" of these defendants to use the infringing composition are "derivative" from defendants Romulus and United Artists, their acts of infringement are nevertheless individual acts which

constitute separate infringements and give rise to separate causes of action.

Encore Music Publications v. London Film Productions, 89 U.S.P.Q. 501, 28 Copyright Bulletin 144 (D.C.N.Y., 1951).

See, also:

Northern Music Corp. v. King Record Distributing Co., 105 F. Supp. 393, 400-401, 401-402 (D.C.N.Y., 1952).

As the defendants freely admitted in the Court below, each infringement is a separate tort. For the reasons set out in Point I, the decisions establishing this rule are persuasive in the instant case.

The only other contention of these defendants is that set forth, *supra*, under Point I, *i.e.*, that infringement by defendants Romulus and United Artists constituted a dedication by plaintiff of his rights. All of the reasons we have previously set forth to demonstrate the error of this argument apply equally as to these defendants. The same fundamental defects still destroy defendants' argument. Performance, without consent of the owner of the common law rights constitutes an infringement by the defendant and is not a dedication or an abandonment by the plaintiff.

As to these defendants, the following additional reasons negate any suggestion that infringement resulted in loss of rights by plaintiff:

1. Defendants have mistaken the effect of the statute of limitations. They have confused the running of a statute of limitations with a dedication. The statute of limitations operates to bar the remedy. It does not affect plaintiff's rights.

Western Coal & Mining Co. v. Jones, 27 Cal. 2d 819, 828, 167 P. 2d 719, 724 (1946):

“The general rule is that the running of the statutory period does not extinguish the cause of action, but merely bars the remedy. That is the law in California.”

Mitchell v. Auto. Etc. Underwriters, 19 Cal. 2d 1, 4, 118 P. 2d 815, 817 (1941):

“The bar of the statute of limitations, however, affects the remedy only and does not impair the obligation.”

Moreover, the privilege of invoking the statute is personal.

Union Sugar Co. v. Hollister Estate Co., 3 Cal. 2d 740, 744, 47 P. 2d 273, 275 (1935);

Freelight v. McGrew, 124 Cal. App. 405, 410, 12 P. 2d 965, 967 (1932).

Thus, the only possible effect of plaintiff's failure to assert his rights against defendants Romulus and United Artists would be to give Romulus and United Artists a *personal defense which would only partially bar plaintiff's remedies or some of them* (see *supra*, Point I). It would not affect plaintiff's rights in his property or bar causes of action arising from infringements by other defendants.

2. Whatever application the statute has in this case, it could not affect plaintiff's remedies in any way until two years after the first infringement by defendants Romulus and United Artists. Therefore plaintiff's remedies against defendants Romulus and United Artists *were not barred on February 1, 1953, or February 6, 1953*. Additional causes of action accrued to plaintiff against all remaining defendants on these later dates.

The California statute of limitations runs only from the date the cause of action accrues. California Code of Civil Procedure, Section 312, quoted *supra*. The statute, therefore, had not run on these claims when plaintiff started the instant action and plaintiff is entitled to pursue all of his remedies against these defendants.*

Thus, under any analysis, a cause of action arose in plaintiff's favor against these defendants. That cause of action was not barred upon any theory of an applicable statute of limitation. Actually, this case is simple insofar as it involves infringement of plaintiff's common law rights in his literary or musical property by defendant music publisher (BMI), the defendant record companies, and the defendant broadcasting companies. No amount of argument and no amount of verbiage can change the fact that none of these defendants committed an infringing act before February 1, 1953, and that the complaint was filed within two years after date.

For these reasons, the judgment should be reversed.

III.

Plaintiff's Remedies Against Defendants, Based on Unfair Competition, Are Not Barred.

Plaintiff's second count, against all defendants', is based on unfair competition [R. 9-11]. Plaintiff alleges that both his composition and its title had acquired a secondary meaning [R. 10]. Plaintiff alleges that by defendants' appropriation of his composition and its title, the general public and the entertainment industry have been "confused and misled" [R. 10-11].

*In passing, it should be mentioned that the torts of these defendants are, in any event, continuing and repeated for the same reasons set forth in Point I, *supra*.

Here the element of public and industry confusion places the action on entirely different basis from an action for infringement of “common law copyright.”

Thus in *Leo Feist, Inc. v. Song Parodies*, 146 F. 2d 400 (2nd Cir., 1944), it was held that a prior action for unfair competition which plaintiff lost did not permit the defendant to successfully plead *res adjudicata* in a subsequent suit for copyright infringement although “the very songs involved in the actions here” (p. 401) were those in issue in the unfair competition case. The reason for the court’s ruling was that the prior state court decision rested “on the finding that purchasers would not be misled, *a fact unimportant in the copyright action.*” (P. 401.)

See also *Collins v. Metro-Goldwyn Pictures Corporation*, 106 F. 2d 83, 85 (2nd Cir., 1939), holding that “in our opinion the claim for copyright infringement involved a different transaction from that for unfair competition and will raise entirely distinct issues on appeal.” This holding has been twice approved by the Supreme Court.

Reeves v. Beardall, 316 U. S. 283, 284, 62 S. Ct. 1085, 1087, 86 L. Ed. 1478, 1479 (1942);

Sears, Roebuck & Co. v. Mackey, 351 U. S. 427, 438, 76 S. Ct. 895, 901, 100 L. Ed. (Adv.) pp. 780, 788 (1956).

The deception and confusion of the entertainment industry and the public is thus an important and distinguishing element in plaintiff’s case. See also *Curtis v. 20th Century Fox Film Corp.*, 140 Cal. App. 2d 461, 464, 465, 295 P. 2d 62, 64 (1956).

In so far as unfair competition by appropriation of the substance of plaintiff's song is concerned, the complaint alleges no specific date on which public or industry confusion commenced. The complaint states only that this confusion and deception began "during the year 1953" and has been continuous to the date the complaint was filed [R. 10].

Defendants have supplied no date, by means of affidavit or otherwise. They might have done so under Federal Rules of Civil Procedure, Rule 12(b). Nor did defendants move for a more definite statement under Federal Rules of Civil Procedure, Rule 12(e).

Insofar as appropriation of title is concerned, the confusion and misleading of the public and the industry began on February 1, 1953 [R. 11], within the two year period.

Defendants have in no way attempted to sustain their statute of limitations defense to plaintiff's claim based on unfair competition. On this appeal plaintiff is entitled to have every inference resolved in his favor, *Sidebotham v. Robison*, 216 F. 2d 816, 831 (9th Cir., 1955), and to have the case reviewed "in the aspect most favorable to the plaintiff and most unfavorable to the defendant."

Woods v. Hillcrest Terrace Corporation, 170 F. 2d 980, 984 (8th Cir., 1948).

There is thus no basis upon which it can be held that the statute applies.

Vassere v. Joerger, 10 Cal. 2d 689, 693, 76 P. 2d 656, 658 (1938):

" . . . '[A] demurrer on the ground of the bar of the statute of limitations does not lie where the complaint merely shows that the action *may* have been

barred. It must affirmatively appear that, upon the facts stated, the right of action is *necessarily* barred. (*Pike v. Zadig*, 171 Cal. 273, 277, 152 Pac. 923; *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 250, 27 Pac. 211, 25 Am. St. Rep. 114.)" (Emphasis supplied.)

Miller v. Brown, 107 Cal. App. 2d 304, 307, 237 P. 2d 320 (1951):

"Hence, a demurrer on the ground that the cause of action was barred by the statute of limitations could not be sustained as it must affirmatively appear on the face of the complaint that it is barred and not merely that it may be barred. (*Pike v. Zadig*, 171 Cal. 273, 152 P. 923.)"

Defendants have failed to carry their burden of showing that the statute must necessarily have run. They are not entitled to a judgment of dismissal.

It should also be noted that the tort of unfair competition of the nature here alleged is a continuing tort and every continuance or repetition gives rise to a fresh cause of action.

See:

4 *Callmann, Unfair Competition and Trademarks*, 1784, n. 2 (1950).

Curtis v. 20th Century Fox Film Corp., 140 Cal. App. 2d 461, 464-465, 295 P. 2d 62, 64 (1956), where the court said:

"Assuming, without deciding, that the wrongful act alleged, i.e., the use of plaintiff's title, was continuous and repeated and that every continuance and repetition gave rise to a fresh cause of action (see 16 Cal. Jur. 524, §123). . . ." (Emphasis supplied.)

See also the cases cited, *supra*, Point I setting forth the California decisions on continuing and repeated torts. Here, as there, defendants could have discontinued their tortious conduct at any time. There was no "permanency" in defendants' conduct. The tort was, therefore, continuing, and under any analysis, plaintiff is not barred by the statute of limitations.

Trombley v. Kolts, 29 Cal. App. 2d 699, 708, 85 P. 2d 541, 545 (1938);

Phillips v. City of Pasadena, 27 Cal. 2d 104, 107-108, 162 P. 2d 625, 626-627 (1945);

Kafka v. Bozio, 191 Cal. 746, 218 Pac. 753 (1923);

Carbine v. Meyer, 126 Cal. App. 2d 386, 390, 272 P. 2d 849, 853 (1954);

34 *Am. Jur.* 127.

For the reasons stated, the judgment rendered on the second count must be reversed.

IV.

The Equitable Relief Sought by Plaintiff in His Third Count Is Not Barred by the California Statute of Limitations.

The third count raises the issue of the applicability of the sole statute relied on by defendants [Sec. 339.1, Code Civ. Proc., R. 15], to claims for the equitable relief of injunction and accounting.

Plaintiff seeks this equitable relief based upon allegations of defendants' intent to continue infringing acts in the future of the same nature as the past infringements alleged in plaintiffs first and second counts. These counts set forth claims for infringement of common law rights in literary property and for unfair competition.

In connection with his claims for equitable relief plaintiff makes three separate contentions:

A. Assuming Arguendo, That Plaintiff's Equitable Rights and Remedies Could Be Barred by California Code of Civil Procedure 339.1 which Affects Legal Rights and Remedies, Plaintiff May, Because His Legal Rights and Remedies Are Not Barred, Enforce His Equitable Rights and Remedies Against Defendants.

We believe that the antecedent portions of this argument conclusively establish that none of plaintiff's legal rights here in issue were, on January 19, 1955, barred by California's limitation statutes except such damages as may have occurred *prior* to January 20, 1953, and for which Romulus and United Artists were solely liable. Therefore, even if equitable remedies are subject to the same statute of limitations which affects the legal rights and remedies at issue herein, plaintiff is entitled to the equitable relief he seeks. Defendants have made no showing of special or "exceptional" (*Lux v. Haggin*, 69 Cal. 255, 270, 4 Pac. 919 (1886)), circumstances of prejudice which could call for the imposition of any equitable bar and no such circumstances exist in this case.

Lux v. Haggin, 69 Cal. 255, 267, 4 Pac. 919 (1886):

"Where an express statute of limitations applies to a suit in equity, mere delay to commence a suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding, and a party cannot be refused a hearing if he shall bring his action within the prescribed period."

See also:

Weber v. Marine Cooks & Stewards Assn., 123 Cal. App. 2d 328, 331, 332, 266 Pac. 801 (1954);
Hugill v. Keene, 204 Cal. 381, 383, 268 Pac. 624 (1928);
Meige v. Pinkham, 159 Cal. 104, 111-112, 112 Pac. 883 (1910);
Boone v. Templeman, 158 Cal. 290, 299, 110 Pac. 947 (1910);
First Nat. Bank v. Stansbury, 118 Cal. App. 80, 88-89, 5 P. 2d 13 (1931).

B. Even If Plaintiff's Legal Remedies Are Barred, His Right to the Equitable Remedy of Injunction Has Not Been Lost.

Even if it be assumed, *arguendo*, that plaintiff's legal rights, or some of them are barred—and we submit that the preceding argument (Points I, II, III, *supra*) conclusively establishes that such rights are *not* barred—yet such a loss does not work a forfeiture of plaintiff's equitable rights.

Insofar as the third count asks for injunctive relief, the applicable statute of limitations is found in California Code of Civil Procedure, Section 343:

“An action for *relief* not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.” (Emphasis supplied.)

There is no specific code provision in California which governs suits for equitable relief of the nature sought herein. From a very early date, California has applied Code of Civil Procedure, Section 343, to suits for injunction.

Pillar v. Southern Pacific R.R. Co., 52 Cal. 42, 44 (1877):

“Thus reading the statute, the four years’ limitation of Sec. 343 applies to all suits in equity not strictly of concurrent cognizance in law and equity.”

In *Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30 (1891), the Court reaffirmed the doctrine of these cases, stating that Code of Civil Procedure, Section 343 applied “‘to all suits in equity not strictly of concurrent cognizance in law and equity’” (p. 67) and extended its applicability to certain actions at law, as well.

The rule was again reaffirmed in *Freeman v. Donohoe*, 65 Cal. App. 65, 223 Pac. 431 (1923).

In *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919 (1886), this rule was specifically applied to a suit for an injunction. The Court there held that Section 343 was the limitation statute applicable to injunctive relief. The court further held that plaintiff’s suit was timely.

Exactly the same rule has been applied in New York which, like California, pioneered the development of the Codes and the abolition of separate courts of law and equity. Section 53 of the New York Civil Practice Act (formerly New York Code of Civ. Proc., Sec. 388), reads as follows:

“An action, the limitation of which is not specifically described in this article, must be commenced within ten years after the cause of action accrues.”

It was early decided that this statute, and *not* the statute relating to the legal rights and remedies, was the applicable statute *if equitable relief was sought*.

Ford v. Clendenin, 215 N. Y. 10, 16, 109 N. E. 124, 126 (1915):

“The provision of section 388 of the Civil Code of Procedure (now section 53) quoted applies to any and every form of equitable action.”

In re Horowitz' Will, 114 N. Y. S. 2d 700, 706 (1952):

Sec. 53 “applies to any and every form of equitable action.”

Peters v. Delaplaine, 49 N. Y. 363, 369-372 (1872);

Brinckerhoff v. Bostwick, 99 N. Y. 185, 193 (1885);

Treadwell v. Clark, 190 N. Y. 51, 59 (1907);

People v. Minuse, 273 App. Div. 457, 78 N. Y. S. 2d 309 (1948).

A suit for an injunction is, of course, not a case “strictly of concurrent cognizance in law and equity.” The question was settled in *Lux v. Haggin*, *supra*, 69 Cal. 255, 4 Pac. 919 (1886), where the court specifically applied Section 343 to an injunction matter and held that plaintiffs’ claim was not barred. The issue is further settled by the California rule that the distinction between law and equity jurisdiction, and the difference between the exclusive and concurrent jurisdiction of equity is, fundamentally, “in the mode of relief” which can be granted by the two different types of courts.

Philpott v. Superior Court, 1 Cal. 2d 512, 515-516 (1934).

See also:

1 *Pomeroy's Equity Jurisprudence* 186 (5th Ed.).

The form of relief here sought is an injunction. It requires no citation of authority to establish the proposition that injunctive relief always was *exclusively* within the domain of the equity courts. It constitutes relief granted *only* by a court of equity. Insofar as the third count of the present complaint seeks injunctive relief—relief a court of law *never* had jurisdiction to grant—the case is within the *exclusive* jurisdiction of the equity court.

The New York courts, under statutes similar to California's, have adopted the rule here contended for by plaintiff.

Hanover Fire Ins. Co. v. Morse D. D. & R. Co., 270 N. Y. 86, 189-190 (1936):

“If relief may be had at law in an action for damages and in equity for a rescission of a contract on the ground of fraud with a reconveyance of the land and an accounting for profits, the action in equity is subject to the 10-year limitation though the action for damages is barred under the six-year statute.” (Citing cases; emphasis supplied.)

See also, *Curtice v. Dixon*, 73 N. H. 393, 394, 62 Atl. 492 (1905). In an action to require cancellation and surrender of a contract obtained by fraud and undue influence and for an accounting thereunder, the court said:

“The mere fact that an action at law for damages occasioned by the fraud might be maintained does not deprive equity of its otherwise *exclusive jurisdiction*.” (Italics ours.)

In *McIsaac v. McMurray*, 77 N. H. 466, 468, 93 Atl. 115, 116 (1915), the Supreme Court of New Hampshire said:

“Cases in which the *remedy* sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the *exclusive jurisdiction* of equity.” (Italics ours.)

See also:

Myers v. Sierra Valley, etc. Ass'n., 122 Cal. 669, 674.

Aside from these authorities, the California rule, as pointed out above, holds that the four-year statute applies “to all suits in equity not *strictly* of concurrent cognizance in law and equity.” (*Dore v. Thornburgh, supra*, 90 Cal. 64, 67.) The word “strictly,” if it is to be given any content, should mean that courts of law and courts of equity do not take concurrent cognizance of, or have concurrent jurisdiction over, suits in which an *exclusively* equitable remedy, such as an injunction, is sought.

Under the California law, therefore, the four year statute, Code of Civil Procedure, Section 343, is, in any event, applicable to plaintiff's claim for injunctive relief, and his claim for such relief is not barred by any statute of limitations.

C. The Claim For An Accounting is Not Barred by Any California Statute of Limitations.

For the reasons set forth above, California Code of Civil Procedure, Section 343 is applicable to all claims for equitable relief “not *strictly* of concurrent cognizance in law and equity,” for the reason that Section 343 governs equitable claims.

A cause of action for an accounting has sometimes been included in enumerations of cases of strictly concurrent jurisdiction. But such a claim for an accounting, whether it be considered an action at law, or suit in equity, has been repeatedly held *to be amenable only to the four year statute*, Code of Civil Procedure, Section 343.* The reason is different than in a suit seeking injunctive relief. The reason is that the action or suit, whether it be at law or in equity, is one for which no provision is made by any specific code section.

The four year statute, therefore, applies.

Howard v. Throckmorton, 59 Cal. 79 (1881);

Cook v. Ceas, 147 Cal. 614, 82 Pac. 370 (1905);

Allsopp v. Hendy Machine Works, 5 Cal. App. 228, 90 Pac. 39 (1907);

Freeman v. Donohoe, 65 Cal. App. 65, 223 Pac. 431 (1923);

Austin v. Jones, Inc., 30 Cal. App. 2d 362, 86 P. 2d 379 (1939).

*In the *Italiani* case, 45 Cal. App. 2d 464, 114 P. 2d 370 (1939), plaintiff's complaint contained a demand for an accounting, but *prior to trial, plaintiff abandoned this claim*. The appeal in the *Italiani* case was on the judgment roll. The judgment recites, "Upon hearing of defendant's motion to compel an election *plaintiff elected to proceed at law for damages in lieu of proceeding in equity for an accounting.*" The fact of this waiver was specifically directed to the attention of the state appellate court in Respondents' Reply (*sic*) Brief, addendum, p. 2: "At the hearing on this motion [to compel an election] appellant elected to proceed at law before a jury for damages rather than to ask for an accounting of profits, and expressly waived any right to an accounting of profits. Accordingly, the action proceeded *solely as one at law*, to be tried before a jury."

Estate of McCabe, 80 Cal. App. 2d 823, 826, 183 P. 2d 72, 75 (1947):

“The general rule is well established that actions in equity, including proceedings for an accounting, where a specific and definite provision has not otherwise been made in the code, are governed by the provisions of section 343, Code of Civil Procedure, a four-year statute, as being actions ‘for relief not hereinbefore provided for.’ (Lux v. Haggin, 69 Cal. 255 (4 P. 919, 10 P. 674); McArthur v. Blasdell, 159 Cal. 604 (115 P. 52); Nougues v. Newlands, 118 Cal. 102 (50 P. 386); Freeman v. Donohoe, 65 Cal. App. 65 (223 P. 431); Wenban Estate, Inc. v. Hewlett, 193 Cal. 675 (227 P. 723).)”

See also:

Big Sespe Oil Co. v. Cochran, 276 Fed. 216, 221-222 (9th Cir., 1921), applying California Law.

It is clear, therefore, that in any event plaintiff is entitled to an injunction and an accounting as against all defendants.

Conclusion.

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

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